

1 SHEILA POLK, COUNTY ATTORNEY
JEFFREY G. PAUPORE, SBN 007769
2 STEVE A. YOUNG, SBN016838
Deputy County Attorney
3 YCAO@co.yavapai.az.us
4 Attorneys for STATE OF ARIZONA

SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA

2012 JAN 18 AM 10:51

SANDRA K. HARRIS, CLERK
BY: S. LANDINO

5
6 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

7 **IN AND FOR THE COUNTY OF YAVAPAI**

8 **STATE OF ARIZONA,**

9 Plaintiff,

10 vs.

11 **STEVEN CARROLL DEMOCKER,**

12 Defendant.

CAUSE NO. P1300CR201001325

**STATE'S MOTION FOR
RECONSIDERATION**

Assigned to Hon. Gary Donahoe

14 The State of Arizona, by and through Sheila Sullivan Polk, Yavapai County Attorney and her
15 deputy undersigned moves this court to reconsider the admissibility of the listed evidence precluded
16 in the first trial (CR20081339). A partial court transcript precluding admissibility for each listed
17 category is attached hereto.

18
19 **UBS Emails and Defendant' cell phone records**

20 Email to Defendant's assistant Jennifer Rydzewski on July 2, 2008 at 3:34 p.m. saying:

21 "Jennifer would you mind closing this account. And then setting if on fire and burying it? Thanks!"

22 This was a joint bank account with Carol Kennedy. Emails with Carol Kennedy dated February 29,
23 2008 (discussing bills) and July 1, 2008 (discussing the 401(k) account) and emails dated June 23,
24 24, 2008 to James VanSteenhuysen and Barbara O'Non on their business split agreement.
25
26

1 The emails and Defendant's cell phone records more than 72 hours from the murder
2 precluded for late disclosure on April 8, 2010.

3 Defendant's records for 12 months previous to July 2, 2008 are relevant to establish a course
4 of cell phone habits compared to when his cell phone was powered off for 4.5 hours on the night of
5 the murder. March 3 and 14, 2008 phone records between Defendant and Mathiason Tri-Gas
6 pertain to the purchase of carbon monoxide. See also Defendant's computer searches for carbon
7 monoxide discussed below. This evidence is probative of premeditation.
8

9 Transcript dated April 8, 2010, pages 10, 11 and 12 attached as exhibit no. 1.

10 **Defendant's statements**

11 Defendant statements to O'Non about: being a \$1 million in debt (made 2007/08); wishing
12 Carol dead; Carol's death was an accident on July 3, 2008; and marriage proposals (just after the
13 murder and before arrest) were precluded for lack of foundation and/or being unduly prejudicial on
14 March 30, 2010.
15

16 Defendant told detectives he and Carol discussed reconciliation 2 days before the murder at a
17 time he was intimately involved with three other women, i.e. Renee Girard, Barb O'Non and Laurie
18 Spira. Defendant's statements to O'Non are probative of premeditation, motive and credibility.
19

20 Transcript dated March 30, 2010, pages 93 to 98 attached as exhibit no. 2.

21 **UBS computer time log**

22 The UBS computer log in/out times on July 2, 2008 precluded for late disclosure on April 28,
23 2010. Defendant told detectives that he returned to the office after 10:08 p.m. on July 2, 2008 to turn
24 off his UBS computer. The computer logs are relevant for a time line and credibility of Defendant.
25

26 Transcript dated April 28, 2010, pages 187 to 190 attached as exhibit no. 3.

American Express and Bank of America records

Defendant/s America Express bank records and Bank of America records for the Kennedy Probate were precluded for late disclosure on April 28, 2010. These bank records are probative of motive for the murder and fraud schemes charge involving the Testamentary Trust. Transcript dated April 28, 2010, pages 198 to 202 attached as exhibit no. 4.

Recorded jail calls

On January 22, 2010 court ordered the State to indentify by February 6, 2010 the jail calls through December 31, 2009 it intended to use at trial. State's disclosed the jail calls in supplements #46 (1/29/09), #48 (3/3/10), #57 (4/5/10) and #62 (4/21/10). Transcript dated January 22, 2010, pgs. 101 to 107 attached as exhibit 5.

On April 13, 2010 the court precluded "some" jail calls through December 31, 2009 that were not identified for use in the State's case in chief. The State's supplement #46 complied with the court's deadline disclosure order. However, there is no record of the specific jail calls precluded through December 21, 2009 and no record of the admissibility of disclosed jail calls after the February 6, 2010. The jail calls are relevant as statements against interest involving the Testamentary trust, voice in the vent, anonymous email.

Transcript dated April 13, 2010, pages 40 to 47 attached as exhibit no. 6.

Search for carbon monoxide

In March 2008 Defendant researches "use of carbon monoxide in suicides" and business plant safety plan. On March 3 and 14, 2008 phone records show calls between Defendant and Mathison Tri-Gas. In March Defendant obtains a federal business tax number (EIN), a prerequisite to purchase carbon monoxide. On May 7, 2008 Defendant filled out a Mathison Tri-Gas delivery form with the new EIN. The plan was aborted when Defendant was told to submit a

1 detailed storage plan to be inspected before delivery of the gas. This evidence is probative of
2 premeditation.

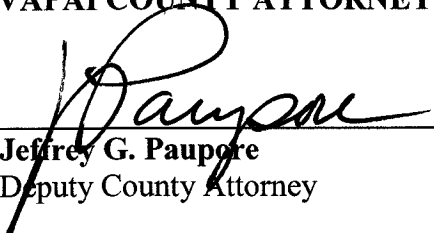
3 On January 15, 2010, the court precluded this information for being unfairly prejudicial
4 under Rule 403. Transcript dated January 15, 2010 pages 21 to 25 attached as exhibit no. 7 and as
5 noted under phone records above, precluded for late disclosure on April 8, 2010.

7 **CONCLUSION**

8 The State moves this court to reconsider the enumerated evidence categories contained
9 herein for admission at trial with appropriate foundation.

10 **RESPECTFULLY SUBMITTED** this 18th day of January, 2012.

11 **Sheila Sullivan Polk**
12 **YAVAPAI COUNTY ATTORNEY**

13
14 By: 
15 **Jeffrey G. Paupore**
Deputy County Attorney

16 **COPY** of the foregoing **Emailed** this
17 18th day of January, 2012, to:

18 Honorable Gary Donahoe
19 Division 1
Yavapai County Superior Court
Via email to Cheryl Wagster: C.Wagster@courts.az.gov

20 Craig Williams
21 Attorney for Defendant
22 P.O Box 26692
Prescott Valley, AZ 86312
23 Via email to craigwilliamslaw@gmail.com

24 Greg Parzych
25 Co-counsel for Defendant
2340 W. Ray Rd., Suite #1
Chandler, AZ 85224
26 Via email to: gparzlaw@aol.com

Office of the Yavapai County Attorney

255 E. Gurley Street, Suite 300

Prescott, AZ 86301

Phone: (928) 771-3344 Facsimile: (928) 771-3110

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Daniela De La Torre
Attorney for victim
Charlotte DeMocker
245 West Roosevelt, Suite A
Phoenix, AZ 85003
Via email to: ddelatorre@azbar.org

Melody G. Harmon
Attorney for victim
Katie DeMocker
210 S. 4th Ave., Suite 220
Phoenix, AZ 85003
Via email to mharmonlaw@gmail.com

By: _____



APRIL 8, 2010
2:50 P.M.

PRETRIAL MOTIONS

APPEARANCES:

FOR THE STATE: MR. JOE BUTNER AND MR. JEFF
PAPOURE.

FOR THE DEFENDANT: MR. JOHN SEARS, MR. LARRY
HAMMOND AND MS. ANNE CHAPMAN.

(THE FOLLOWING IS A PARTIAL TRANSCRIPT OF THE
PROCEEDINGS HELD ON APRIL 8, 2010:)

MR. SEARS: Before we go, we are under the
impression, from things that you said yesterday, that we
might hear from you on all of the motions that were under
advisement and the motions that were briefed today.

THE COURT: I can do that, if you wish.

MR. SEARS: We would very much like to hear
that, Your Honor.

There is an issue with regard to a
supplemental brief filed late this morning by the State.

THE COURT: I haven't seen that.

MR. BUTNER: Let me give you a copy at this
time, Judge, and sorry that you haven't seen that.

THE COURT: Then we won't recess.

(Whereupon, the Court reviews a document.)

MR. BUTNER: Does the Court wish to hear any
additional argument?

THE COURT: I don't think so. I have heard

from both sides, substantially, each of the issues that were
raised in the various motions.

I think there are a couple of
observations that I ought to make. I recognize that both
sides have an obligation of disclosure. Rule 15.1 requires

24 the obtaining of the bank information, I don't think that a
25 sanction is appropriate. I think that sufficient diligence

1 was used with regard to obtaining even the more recently 12
2 discovered bank account. But sanctions, I think, are
3 appropriate with regard to what I have mentioned and
4 inclusive of the large amount of e-mails. I am not
5 persuaded, frankly, with regard to the UBS e-mails that
6 relate to the back and forth between Mr. DeMocker and
7 Miss Kennedy that preceded the divorce are relevant or
8 probative on the issues of this case. That has to do with
9 something that occurred a couple of months after the divorce
10 decree was issued or agreed upon. And commonplace in the UBS
11 are back and forth on property settlement issues and that
12 sort of thing that, frankly, are not that probative or
13 relevant with regard to what took place in this case.

14 To the extent that there is financial
15 information contained in there that the expert for either
16 side may rely upon, if that is contested in some fashion, I
17 may allow those to be used for impeachment purposes. But in
18 terms of substantively admitting those, I don't see that it
19 adds anything, therefore, is more subject to sanction by
20 preclusion than other information may be.

21 Similarly, the State urged that the
22 Barbara O'non back and forth to purportedly corroborate
23 Miss O'non's testimony that she talked about when she was in
24 front of me in the last couple of weeks, to the extent that
25 it is simply corroboration, then it is cumulative and not

1 that necessary to the State's case. And since there was a 13
2 late, and I think without due diligence, disclosure of those,
3 I am not of a mind to change my mind about precluding those.

4 In terms of communications between
5 Mr. DeMocker and Miss Kennedy within the 72 hours in advance
6 of her death, I think that those are more probative and less
7 subject to sanction, even with the delayed discovery, and
8 those may be allowed by the Court.

9 Communications after the fact that
10 reflect that Mr. DeMocker uses a cell phone, I don't think
11 are particularly relevant, unless there is a necessary
12 impeachment of a witness concerning that. And so, I think I
13 will reserve the right to modify an order of preclusion with
14 regard to those, if there is an impeachment issue. But,
15 generally speaking, I don't see that as needful testimony. I
16 would find it to be cumulative, and therefore, the
17 information is more subject to preclusion as a sanction for
18 that reason, having considered the importance to the
19 respective cases.

20 Communications about -- to someone named
21 Jennifer, and I think it was No. 196 or 197, doesn't seem
22 particularly probative of anything. And that one I would
23 preclude for late disclosure purposes.

24 So in general, speaking of particular
25 items, I think that there are some things that are probative,

1 and I am not going to preclude, but most of that information,¹⁴
2 I think that it comes under the same rubric that I adopted
3 about it being late disclosed and subject to sanction.

4 The Barrs decision says that the Court
5 ought to consider whether one or other party will suffer harm
6 from the granting of a continuance, and I think that a
7 continuance is not appropriate under these circumstances,
8 having regard to the Court's calendar, having regard to the

9 jury selection process that has already commenced, and having
10 regard to the lateness of the effort made, the diligence with
11 regard to investigation and disclosure.

12 So what sanction is appropriate, having
13 found there to be a violation of the letter and the spirit of
14 Rule 15. And as I say, I have determined that I don't think
15 striking the death penalty entirely is appropriate. I have
16 determined that other than the exclusion of a large number of
17 UBS records and e-mails, I think it is appropriate to strike
18 the two -- two of the three remaining aggravating factors,
19 and that is my sanction that I am going to employ in the
20 case. And that will leave the State with aggravating factor
21 (f)(5), the pecuniary aggravating factor in the case.

22 Does that answer your question,
23 Mr. Sears?

24 MR. SEARS: Yes, Your Honor.

25 THE COURT: Any clarification needed by the

1 State?

15

2 MR. BUTNER: So, Judge, just to clarify then,
3 the shoe print evidence is not precluded?

4 THE COURT: That's correct.

5 MR. BUTNER: Thank you.

6 THE COURT: But that is part of the whole
7 consideration of what's taken place in the case. And a
8 sanction for that is the striking of the 703(f)(2)
9 aggravating factor.

10 MR. BUTNER: I understand.

11 THE COURT: Anything further today that you
12 need to have me clarify?

13 MR. BUTNER: Nothing further from the State.

14 MR. SEARS: No, Your Honor.

ORIGINAL

SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

2010 APR 12 PM 1:53

IN AND FOR THE COUNTY OF YAVAPAI

JEANNE ECKS, CLERK

S. KELBAUGH

BY: _____

THE STATE OF ARIZONA,)

Plaintiff,)

vs.)

No. CR 2008-1339

STEVEN CARROLL DEMOCKER,)

Defendant.)

BEFORE: THE HONORABLE THOMAS B. LINDBERG
JUDGE OF THE SUPERIOR COURT
DIVISION SIX
YAVAPAI COUNTY, ARIZONA

PRESCOTT, ARIZONA
TUESDAY, MARCH 30, 2010
3:06 P.M.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

PRETRIAL MOTIONS

TESTIMONY OF BARBARA O'NON

ROXANNE E. TARN, CR
Certified Court Reporter
Certificate No. 50808

1 this testimony. So it really goes to character and asks the
2 jury to essentially find that because he was angry on two
3 specific occasions with Miss O'non, that he was also angry
4 and could have carried out a murder of his then ex-wife.

5 So I think that prejudicial value is
6 significantly outweighing the probative value for this
7 testimony. I am going to preclude the evidence of the two
8 instances of what Miss O'non testified about. And a good
9 part of that is the lack of any real notion as to when it
10 happened, circumstances of whether anybody else witnessed it.

11 But honestly, the nature of what it is
12 being used for -- and I think it is being used for
13 impermissible character evidence rather than any permissible
14 purpose -- but nonetheless, in a 403 weighing, I would find
15 that the evidence is unduly prejudicial versus its very
16 limited probative value, and it doesn't prove increasing
17 anger over time. There was no fear -- though there was some
18 sudden surprise at the way in which the defendant behaved on
19 the particular occasions -- that there wasn't any threat or
20 any longstanding fear, given what the rest of the testimony
21 was about the further relationships.

22 Testimony about other statements made by
23 the defendant or characterizations of the defendant as being
24 unhappy over paying a large sum of money, I don't think the
25 characterization is allowable. There are problems with

1 regard to the foundation as to when that is occurring. There
2 are foundational problems with regard to -- and she couldn't
3 give any time frame on when Mr. DeMocker allegedly made the
4 statement about possibly being a million dollars in debt. I
5 think that is also lacking in foundation and unduly
6 prejudicial. I am going to preclude that.

7 With regard to the general breakup of the
8 business relationship, I think that is not prior bad act
9 material. I think that that is simply descriptive of what
10 was going on in the year or so or actually the few months
11 prior to Carol Kennedy's death. I think that's relevant. I
12 think it is admissible.

13 Her own notions -- that is to say,
14 Miss O'non's own notions about having some reluctance to go
15 on a camping trip, I don't find that probative or relevant.
16 Her mental state is not at issue in the case. So whether she
17 was afraid or not afraid to go on a camping trip, I don't
18 find that information to be admissible or relevant and would
19 disallow that.

20 His -- any statement that can -- in which
21 sufficient foundation can be laid, that the feeling by
22 Mr. DeMocker was that the terms of the dissolution were not
23 fair, I think is fair game with regard to his financial
24 status at the time. So I won't preclude that. But I think
25 that there are some real issues with regard to the

1 foundation. I didn't hear a good foundation with regard to
2 that today, and so there will have to be some careful
3 foundation laid to be able to get into any statements and not
4 characterizations of what was said, but to the best of her
5 ability, a statement of what the defendant said.

6 Types of shoes that he had. She can't
7 testify that they were identical. She can only testify that
8 there were a large number of running shoes, what she called
9 "tennis shoes." She can testify about the shoes, but I don't
10 think she can say anything about the particular shoes in
11 Exhibit 169. She simply wasn't attentive to that.

12 The request to marry multiple times, I
13 don't find that probative of any particular issue in the
14 case. I am going to preclude that. I don't find that
15 information relevant or whether there were proposals to other
16 women relevant for any genuine purpose at issue in the case.
17 I will preclude that finding that -- that ruling supported by
18 404, as well as by 403.

19 I don't know that spending the night
20 together on a couple of occasions, when both are consenting
21 adults, after the divorce had been granted, is something that
22 is prejudicial.

23 The story of what the defendant was doing
24 and where he was in terms of admission by a party I think is
25 permissible. I think there was sufficient clarity as to when

1 that discussion took place. So that is allowable, but as I
2 understand it, it's basically the same story that the
3 defendant gave the police -- more or less. So in general, I
4 think she can testify about her financial relationship, about
5 the fact that they had a personal relationship.

6 Wishing Carol dead on occasions, I didn't
7 find sufficient foundation for precisely what was said. I
8 don't think it what wishing that Carol was dead. I do think
9 it was more along the lines that Mr. Sears indicated the
10 testimony was, that "they," which I think refers to either
11 himself and/or children, would be better off. But I think
12 that carries such a potential prejudicial bombshell that I
13 think that the prejudicial value significantly outweighs the
14 probative value as far as that goes. So I will rule that
15 inadmissible.

16 Other questions that I haven't addressed
17 that you think I need to?

18 MR. SEARS: Your Honor, there was the -- the
19 statement that was elicited about whether Mr. DeMocker told
20 her that this was an accident. I think the inference from
21 the State was that they would want the jury to draw was that
22 Mr. DeMocker was lying to her, that he knew by the time that
23 he had this conversation that it was not necessarily an
24 accident. She said on cross-examination that she couldn't
25 remember what it was, but she was leaning towards what I was

1 suggesting, which was that Mr. DeMocker told her that the
2 police said it might have been an accident. The prejudicial
3 effect of that in the 403 balancing, I think, would point to
4 the exclusion of that, because the State would simply want
5 that out there for the jury to think that Mr. DeMocker was
6 lying and covering up what he had done.

7 THE COURT: I don't think she was sufficiently
8 definite on that issue to allow that testimony, given what
9 your lack of recollection was. So I will disallow that, as
10 well.

11 MR. SEARS: There were two other areas, Your
12 Honor. One of them was a new area for us, at least, where
13 she was allowed on redirect to say that Mr. DeMocker didn't
14 express any remorse.

15 THE COURT: That was an issue I was about to
16 take up. I don't think that -- first of all, I don't think
17 that that comment was a statement. It was more a
18 characterization that there wasn't anything that was said.

19 I think if he is -- if he is the one that
20 did the harm to Ms. Kennedy, then one may expect some sort of
21 remorse, potentially, for that, and what his mental state is.
22 If he is the one that didn't do the harm to Ms. Kennedy, I
23 think different people can react in different ways with
24 regard to that, and I think it carries a high degree of
25 prejudice and isn't very probative of whether he had anything

ORIGINAL

SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA

2010 MAY 11 PM 2:01

JEANNE HICKS, CLERK

BY: S. KELBAUGH

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

THE STATE OF ARIZONA,

Plaintiff,

vs.

STEVEN CARROLL DEMOCKER,

Defendant.

No. CR 2008-1339

BEFORE: THE HONORABLE THOMAS B. LINDBERG
JUDGE OF THE SUPERIOR COURT
DIVISION SIX
YAVAPAI COUNTY, ARIZONA

PRESCOTT, ARIZONA
WEDNESDAY, APRIL 28, 2010
1:39 P.M.

REPORTER'S PARTIAL TRANSCRIPT OF PROCEEDINGS

PRETRIAL MOTIONS

ROXANNE E. TARN, CR
Certified Court Reporter
Certificate No. 50808

1 Miss Hinsch from testifying or from the State presenting a
2 report concerning that. If there is something really
3 distinct that she winds up with, I suppose I may -- you may
4 wish to have me reconsider that decision, Mr. Butner, but at
5 this point here we are right before the trial. I am not sure
6 that I would reconsider it. I am not giving you any
7 guarantees that I would.

8 MR. BUTNER: I understand, Judge.

9 THE COURT: It seems to me it would have to be
10 thoroughly critical to the State's case and distinct from
11 what some other computer expert might say, so that there is
12 some overriding necessity to do it. And I suppose I will
13 probably need some explanation as to why it was not done
14 earlier than what it was.

15 Ms. Chapman, next.

16 MS. CHAPMAN: Yes, Your Honor. The next is a
17 document that was disclosed that lists date, time and
18 activity. It was disclosed, I think --

19 THE COURT: Is that the log-in, log-out
20 allegedly for UBS?

21 MS. CHAPMAN: Allegedly. The document isn't
22 identified that way. It is identified by the State that way.
23 There is no indication at all where that came from or who
24 provided it or when it was provided. It was disclosed to us
25 on March 23rd. There is no way for us to determine what it

1 is. Mr. DeMocker was arrested approximately 16 months before
2 it was disclosed to us at UBS. So I don't know why it is
3 being disclosed to us now.

4 THE COURT: For clarification sake in my mind,
5 did the dates on this log-in, log-out for UBS relate back to
6 some earlier time when Mr. DeMocker was not in custody?

7 MS. CHAPMAN: They do, Your Honor. To the
8 best of my recollection, they do. But again, I don't have
9 any way to determine where that came from or how it was
10 created. It literally is a chart, time, date, and activity.
11 It doesn't say log-in, log-out. It doesn't say anything
12 about UBS. It doesn't say anything about Mr. DeMocker.

13 THE COURT: Do you know a beginning date or
14 end date?

15 MS. CHAPMAN: I think it is June and July of
16 '08, Your Honor.

17 THE COURT: So, in the time frame within a
18 month or more so before the death of Ms. Kennedy.

19 MS. CHAPMAN: Sure, yes. That is the best of
20 my memory, Your Honor.

21 The State's reply indicates that it
22 accidentally overlooked this document. We have had, as you
23 know, literally I would guesstimate in the 20 -- actually, I
24 know we have received over 20,000 pages of disclosure from
25 UBS and UBS-related entities in the form of e-mails and

1 otherwise.

2 So, Your Honor, at this point in the
3 absence of some other explanation that it was just
4 overlooked, and given that we don't have any idea what it is,
5 where it came from, or when it was disclosed to the State,
6 we'd ask Your Honor to preclude it. I simply don't know what
7 it is.

8 THE COURT: Mr. Butner.

9 MR. BUTNER: Apparently, Judge, it is a
10 log-in, log-out sheet on Mr. DeMocker's computer, his UBS
11 computer, and it was provided to the State very early on in
12 this case. I believe by way of subpoena. It went through
13 Mr. Henzy, the attorney that was representing UBS at that
14 time, and he directly provided that particular record. And
15 for some reason, it did not get disclosed. And that's where
16 it came from. And it comes from UBS. Basically, they are
17 saying that that is their record. I guess, they somehow kept
18 this kind of a log record. It is a very plain sheet of paper
19 with just this log-in, log-out type of information. And we
20 overlooked it.

21 THE COURT: Critical need for the State's case
22 is what?

23 MR. BUTNER: It is not a critical need to the
24 State's case. It kind of establishes when the defendant came
25 to work on July the 2nd and when he checked out of work and

1 that kind of thing. And there is a period of time right
2 around that same time frame.

3 THE COURT: Doesn't sound like a critical
4 need, and does sound like it wasn't disclosed in a timely
5 fashion. I am going to exclude it.

6 MS. CHAPMAN: Moving on. The next is with
7 respect to a witness, Dan Jensen. Mr. Jensen was disclosed
8 as an expert on March 26. We weren't provided with any CV or
9 any report. He was just listed in the disclosure. Your
10 Honor ordered the identification of witnesses on April 12th.
11 He was not listed as an expert in that list. He was,
12 however, listed as a custodian of records.

13 As Your Honor knows, the cell tower
14 information has been an issue in this case since November of
15 2008. It was at that time that the defense made repeated
16 requests for this information as it relates to Mr. Knapp.

17 Today in the State's reply that I
18 received this morning, they are now identifying him again as
19 an expert on Sprint cell towers, the capability of Sprint
20 cell phone network, and the manner in which Sprint keeps
21 track of time logs on Sprint cell phones, coverage map of
22 Sprint cell phone towers. Apparently, he is now offered as
23 an expert on those areas. Again, we don't have a CV. We
24 don't have a report. He wasn't disclosed as an expert on the
25 April 12th list. And the State has known the cell tower

ORIGINAL

SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA

2010 MAY 11 PM 2:01

JEANNE HICKS, CLERK

BY: S. KELBAUGH

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

THE STATE OF ARIZONA,

Plaintiff,

vs.

STEVEN CARROLL DEMOCKER,

Defendant.

No. CR 2008-1339

BEFORE: THE HONORABLE THOMAS B. LINDBERG
JUDGE OF THE SUPERIOR COURT
DIVISION SIX
YAVAPAI COUNTY, ARIZONA

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WEDNESDAY, APRIL 28, 2010
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PRETRIAL MOTIONS

ROXANNE E. TARN, CR
Certified Court Reporter
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1 and I thought it would be appropriate to present matters of
2 public record that they had filed a previous divorce petition
3 and then abandoned that action. That is why I offered those
4 records.

5 THE COURT: At this point in terms of the
6 State's case in chief, I am going to preclude it. But in
7 terms of if there are issues that may need rebutting based
8 on -- for impeachment purposes, I will revisit the issue if
9 you wish me to.

10 MR. BUTNER: Thank you.

11 MS. CHAPMAN: Your Honor, we had filed a
12 motion to preclude with respect to two different sets
13 of -- excuse me. Hi, Phil.

14 (Whereupon, a discussion was held re potential jury panel
15 which was reported but is not contained herein.)

16 THE COURT: While we are doing that,
17 Ms. Chapman, what other issues are you still looking at?
18 Bank records and photos?

19 MS. CHAPMAN: Yes, Your Honor.

20 With respect to bank records, we had
21 filed motions to preclude with respect to two sets of Bank of
22 America records and the American Express records. The State
23 only responded with respect to American Express. And I think
24 what the State's response is is essentially that Your Honor,
25 in your earlier ruling, decided that you weren't going to

1 preclude any bank records based on late disclosure, which
2 wasn't my understanding of what you had decided.

3 And so with respect to one of the Bank of
4 America records in particular, these relate to the estate
5 records of which Katie DeMocker was the executrix. The State
6 was aware of those certainly as early as October '08. They
7 did not disclose them to us until April 2nd. They are not at
8 all relevant. I don't know how they would be relevant. And
9 we ask Your Honor to preclude those in particular, but there
10 are three sets of bank records disclosed in April.

11 THE COURT: Mr. Butner.

12 MR. BUTNER: Judge, I am not sure about the
13 records of Katherine DeMocker as executrix of that B of A
14 account, and I can't think of the relevance of those. But
15 the other records are efforts to get the complete records
16 from the defendant's bank accounts, which were numerous, and
17 we had difficulty getting complete records, and we discovered
18 that we didn't have complete records for those accounts, The
19 National Bank records and B of A accounts and also the
20 American Express account. That is why we subpoenaed those
21 records again and again and again. There is so many of them
22 that it was hard to keep going through them and analyzing and
23 finding where they were missing.

24 THE COURT: And the import of those for the
25 State's case?

1 MR. BUTNER: Well, Judge, quite frankly, all
2 of these bank records have been marked as an exhibit, but it
3 is unlikely that the State is going to be putting in all of
4 these bank records. But Mr. Echols has relied upon
5 statements from all of these bank accounts. And we wanted to
6 make sure that we had all of the complete account records for
7 each of these accounts, rather than just, for example, the
8 latest statements, so to speak, to support his opinions. And
9 that is why we subpoenaed all of these records. They are
10 critical to the State's case in that regard, although they
11 may very well not end up in evidence in this case.

12 THE COURT: But he rendered the opinion
13 without the records?

14 MR. BUTNER: He didn't render the opinion
15 without the records, per se, Judge. It is just, for example,
16 you can look at bank account records, you can see that he had
17 "X" number of dollars at this point in time. If they skip
18 several months, you can see he had "X" number of dollars at
19 this point in time. You have a statement here and you have a
20 statement there. You can fill in the gaps. That is the kind
21 of thing that was done with these sorts of records. That
22 includes the American Express records, too. Mr. DeMocker
23 lived using credit cards, basically, all of the time rather
24 than money.

25 THE COURT: Some people do that.

1 MS. CHAPMAN: Your Honor, might I
2 interrupt. If we have an answer, I know Phil is waiting.

3 (Whereupon, a discussion was held re potential jury panel
4 which was reported but is not contained herein.)

5 MS. CHAPMAN: Your Honor, we are very close
6 and I will go as fast as Roxanne will let me go.

7 With respect to the bank records, back to
8 the bank records, Your Honor. It is very hard for us, and I
9 think it is obvious from Mr. Butner's response that it is
10 very hard for to us to know what to do with all these
11 records. We keep receiving them. If Mr. Echols is going to
12 rely on them, then we have to be able to review them.
13 Mr. Echols hasn't created or drafted another opinion or
14 report since it was generated and will not be offered, we
15 understand. So I am not sure what to do with that
16 information.

17 What I can tell you specifically with
18 respect to those Bank of America account records for Katie as
19 the executrix of the estate, I don't think those have any
20 relevance to the issues that Mr. Butner identified earlier.

21 THE COURT: I think he conceded that.

22 MS. CHAPMAN: We are asking Your Honor to
23 preclude those. At some point the State has to stop.
24 Mr. Echols has to stop.

25 THE COURT: The Court will preclude the newly

1 disclosed records from April 2nd, since they were not relied
2 upon for purposes of evaluating the records and providing the
3 opinion. The State agrees the reason for the records was to
4 support Mr. Echols' opinion. He has not changed his report.

5 For those reasons and because they are
6 newly disclosed, I will preclude them. If they are
7 absolutely necessary for impeachment or rehabilitation
8 purposes, after attack or cross-examination by the other
9 side, I may revisit whether some of those may be able to be
10 used. But don't count on my reversing course on that. But
11 in the interests of the truth seeking process and fairness, I
12 may revisit that for selected purposes.

13 MS. CHAPMAN: Your Honor, the last two issues,
14 one is with respect to this photo disk of Y-Y, which were
15 photos of the 840 Country Club. Those accompany the report
16 that the State acknowledged last time that they had no
17 justification for disclosing late. So those photos were
18 taken at that same time. I believe sometime in '08.

19 THE COURT: What is the relevance for 840
20 Country Club at all?

21 MR. BUTNER: Judge, in the State's response,
22 which apparently you didn't get, the State -- we indicated
23 that basically the photos show -- the most important thing is
24 they show the residence, but they show the instructions that
25 were left at the residence on how to use the Internet. And

ORIGINAL

SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

2010 JAN 27 PM 2:09

IN AND FOR THE COUNTY OF YAVAPAI

CLERK ✓

B. Hamilton

BY: _____

THE STATE OF ARIZONA,)

Plaintiff,)

vs.)

STEVEN CARROLL DEMOCKER,)

Defendant.)

p1300
No. CR 2008-1339

BEFORE: THE HONORABLE THOMAS B. LINDBERG
JUDGE OF THE SUPERIOR COURT
DIVISION SIX
YAVAPAI COUNTY, ARIZONA

PRESCOTT, ARIZONA
FRIDAY, JANUARY 22, 2010
8:59 A.M.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

HEARING ON MOTIONS
TESTIMONY OF CAPTAIN JAIME CICERO

ROXANNE E. TARN, CR
Certified Court Reporter
Certificate No. 50808

1 MR. BUTNER: Okay.

2 THE COURT: Before you do, I recognize that
3 the parties have been making arrangements, for example, with
4 labs to test in commonalty some of the remaining exhibits.
5 And so to the extent that a report hasn't been prepared with
6 regard to that, I will probably not preclude that
7 information. But if there is anything that is disclosed that
8 pertains to what has already been done before today, and it
9 is not disclosed by the 6th of February, I am probably going
10 to preclude it.

11 MR. BUTNER: Okay. That clarified exactly
12 what I wish to draw to the Court's attention. I appreciate
13 that.

14 THE COURT: Thank you.

15 MR. BUTNER: Thank you.

16 THE COURT: Miss Chapman, next?

17 MS. CHAPMAN: Your Honor, I think that the
18 remaining item here is with respect to Item No. 5, which are
19 the defendant's statements. And the State's reply is that it
20 intends to rely on specific statements, and then all of the
21 statements that is provided to us in Mr. DeMocker's jail
22 calls. I think you heard the number is over 2700 calls. We
23 had parts of them up through August transcribed. That is
24 approximately 25,000 pages of transcription. That leaves us
25 with several other months. It is an incredibly costly and

1 expensive and time consuming process. And we would ask that
2 the State identify -- let me back up for a minute.

3 We also don't have any reports or
4 summaries or other documentation about what is happening with
5 those calls, and do have some information that they are being
6 listened to because search warrants have arisen as a result
7 of some of those conversations, so we would like to request
8 some of those reports and summaries. And also an
9 identification of what, if any, of those calls that the State
10 actually intends to rely on.

11 THE COURT: Mr. Butner.

12 MR. BUTNER: Judge, there were some summaries
13 done early on. It became overly burdensome. They are not
14 really doing summaries anymore. We can provide them with the
15 summaries that have been done, but there aren't summaries
16 being done and haven't been done for quite some time. We are
17 providing the conversations. I will request that we get an
18 updated amount of the conversations to the defense. It would
19 seem to me that we can provide them with the recorded
20 conversations through the end of December. I think that is
21 about as much as we have looked at, at this point anyway, and
22 we will do that. We can do that, I suppose, by the end of
23 next week. But in terms of reports and things of that
24 nature, those aren't being done.

25 THE COURT: How do you know you intend to use

1 any of them if they haven't been listened to, if they haven't
2 been summarized, if there is nothing relevant on them to nail
3 down which ones you are going to use or not use?

4 MR. BUTNER: Judge, I didn't say they haven't
5 been listened to. They have been listened to. And
6 ultimately I am going to have to go back and listen to some
7 jail phone calls and pick out the ones that we need to use.

8 THE COURT: If they have been listened to, if
9 they have some relevant information on them, then hasn't
10 there been some type of reporting that would identify which
11 ones may have relevancy from those that are simply, pardon
12 the expression, background noise to the case?

13 MR. BUTNER: Like I said, there were some
14 summaries done early on, but there have not been summaries
15 done as of late.

16 THE COURT: Those for which summaries have
17 been done, is there relevant information on them that you
18 think you are going to use?

19 MR. BUTNER: Not very much, Judge. We will
20 disclose the summaries that have been done, as I stated.

21 THE COURT: And those that do have information
22 that is relevant and possibly admissible, can you identify
23 the call or date or time or CD, some fashion of identifying
24 what it is the information is that you are going to want to
25 propose putting in front of the jury?

1 MR. BUTNER: Understand the people that have
2 been listening to these jail phone calls, and this is why
3 there aren't many summaries done, are volunteers, so to
4 speak, for the most part. On occasion some deputies that
5 were on leave, or something of that nature, limited duty kind
6 of deputies that listen to the phone calls. They have not
7 been doing reports on them. I am going to have to listen to
8 what a volunteer thinks might have been important. And I
9 don't have summaries of that stuff. To the extent that I do
10 have summaries from early on, I will do that.

11 THE COURT: How many items are there, do you
12 think, out of the 2700 or so that I am told exist?

13 MR. BUTNER: I have no idea.

14 MS. CHAPMAN: We haven't received any
15 summaries, so the record is clear, of any phone calls.

16 THE COURT: Okay. And when can you provide
17 the summaries and/or transcripts and/or notes that pertain to
18 these calls? When can you provide those to the defense?

19 MR. BUTNER: Well, I have never seen them,
20 Judge, so I really don't know. How about within -- let's
21 just say by February the 12th, I will be able to have
22 garnered that information, because I don't even know where to
23 ask at this point.

24 THE COURT: I guess that answer confuses me.
25 Do you need to consult with your staff at all for that

1 information?

2 MR. BUTNER: I don't think my staff knows
3 either. I think that information is, like I said, it was
4 being handled by volunteers. And so that is why I give to
5 the Court about, you know, several -- a couple of weeks here,
6 because I don't know where that information is. I don't know
7 what it is going to take to get it together.

8 THE COURT: All right. For those calls that
9 have been obtained through December 31st of 2009, I will
10 order that you identify in some clear fashion, which of those
11 items you intend to use. And because I am not privy to the
12 manner of how they have been disclosed so far, I guess I am
13 uncertain as to how to do it in any other fashion than
14 identifying the call by date and number and the proposed
15 information contained in that.

16 I think that for those calls that have
17 been obtained through the 31st of December by means of a
18 report that has already been done or a transcript, that you
19 provide that information, if it exists, to the defense no
20 later than the 6th of February. And if you intend to use any
21 of the calls, you will need to identify them that occurred --
22 those that occurred before December 31st, 2009, no later than
23 the same date, so that they don't have to type up a
24 transcript of every call that was ever made at great expense
25 and difficulty.

1 I imagine that most of this is, pardon
2 the expression, background noise to the case that has nothing
3 to do with the facts of the case and probably isn't relevant
4 to anything else. To the extent that you have these calls
5 and you intend -- if you have disclosed them and intend to
6 use them, they have to be duplicated. If they haven't been
7 duplicated, they must be duplicated and provided by the 6th.

8 And I did a somewhat arbitrary cutoff
9 with December 31st for the 6th, and I will go a week later to
10 the 13th for any that are in January through the 13th of
11 February. If you intend to use any of that, that has to be
12 identified so that all of them are identified by date, time,
13 and if possible, some other mechanism of identifying what CD
14 they are on -- if that is the manner of disclosure -- what CD
15 they are on by designation letter, number, however you folks
16 are designating them, or else they may be precluded from any
17 type of use at trial.

18 What next?

19 MS. CHAPMAN: Your Honor, I think that covers
20 the issues that were in the -- in this motion. There are
21 some other issues that we had talked about when we were here
22 last week that we would raise today, time permitting. I
23 don't know if you want to go to those, but I believe that
24 that covers all of the areas that were outlined in the
25 original motion to compel.

1 THE COURT: What else did you wish to discuss?

2 MS. CHAPMAN: Your Honor, Mr. Butner was
3 provided last Tuesday with a letter addressed to John Kennedy
4 and Ruth Kennedy, and he was going to advise us whether or
5 not he would agree to mail those letters. I haven't heard
6 whether he did mail those letters. So, that is the first
7 item.

8 THE COURT: Mr. Butner, the Kennedy letters?

9 MR. BUTNER: I have spoken personally with
10 John and Ruth Kennedy. Those letters are going to be mailed
11 today.

12 THE COURT: All right. Thank you.

13 MS. CHAPMAN: Your Honor, the other issue is
14 with respect to the pending 14 items that were being tested.
15 We did receive a report back from the lab. My understanding
16 is that we were going to receive information about any
17 additional tests that were going to be conducted with respect
18 to the 14 items. And we don't have information about whether
19 any additional testing is anticipated or going to be
20 performed. But we would like to have that information in
21 anticipation of the hearing that you set in early March,
22 where we intend to address the other DNA issues in our in
23 limine motion.

24 THE COURT: Mr. Butner.

25 MR. BUTNER: Judge, that information will be

1 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

2 IN AND FOR THE COUNTY OF YAVAPAI

3
4 THE STATE OF ARIZONA,)

5 Plaintiff,)

6 vs.)

No. CR 2008-1339

7 STEVEN CARROLL DEMOCKER,)

8 Defendant.)

9
10
11 BEFORE: THE HONORABLE THOMAS B. LINDBERG
12 JUDGE OF THE SUPERIOR COURT
13 DIVISION SIX
YAVAPAI COUNTY, ARIZONA

14 PRESCOTT, ARIZONA
15 TUESDAY, APRIL 13, 2010
16 11:11 A.M.
A.M. SESSION ONLY

17 REPORTER'S TRANSCRIPT OF PROCEEDINGS

18 PRETRIAL MOTIONS

19
20
21
22
23
24 ROXANNE E. TARN, CR
25 Certified Court Reporter
Certificate No. 50808

1 So we'd ask Your Honor to limit their use
2 of any and all statements to those statements that it's
3 properly identified.

4 THE COURT: Mr. Butner.

5 MR. BUTNER: Judge, first of all, the State
6 has made all kinds of disclosure about all of the statements
7 that Mr. DeMocker has made, starting with, of course, the
8 ~~interviews that took place in close proximity to the crime,~~
9 and then thereafter there were other statements that were
10 discovered that were disclosed to the defense, and they have
11 been noticed in terms of the statements made to all those
12 people that were identified. They are all set forth in the
13 reports.

14 THE COURT: In terms of identifying them, we
15 are not talking about the ones that were made to law
16 enforcement. They are conceding to that point.

17 Apparently, we are talking about jail
18 visits or statements that are attributed to Mr. DeMocker from
19 civilian witnesses, not law enforcement personnel.

20 MR. BUTNER: Well, those are very different
21 sorts of statements.

22 THE COURT: I understand that.

23 And so the -- with regard to the jail
24 visits, don't you think that Rule 15.1 requires you to
25 provide the recording of the statement?

1 MR. BUTNER: Yes.

2 THE COURT: And don't those have to be timely
3 disclosed?

4 MR. BUTNER: Well, we didn't realize that we
5 were going to need to provide those things until January, and
6 we gathered that stuff up and provided it, Judge. It had
7 been being accumulated, in terms of people listening to the
8 calls and making synopsises.

9 When we disclosed it, we were under the
10 order of the Court and of the belief that we needed to
11 disclose the ones that mattered, so to speak, and we
12 identified those with a specific report from Detective
13 McDormett.

14 THE COURT: How do the statements fit in to
15 having some probative value on the merits of the case? What
16 is the nature of the statements, since I don't have access
17 here?

18 MR. BUTNER: There is so many, Judge, that I
19 can't tell you right now, but let me clarify to you.

20 The actual recordings of the jail visits
21 were being disclosed in a timely fashion as we went along.
22 It was the synopsises and then the requested additional
23 specificity as to are these important ones that was clarified
24 by the report from Detective McDormett.

25 In terms of the other statements to other

1 people, that was made clear right at the outset in the police
2 reports. For example, statements to Charlotte DeMocker and
3 Jacob Janusek in close proximity to the time; statements that
4 Mr. DeMocker made to other people about where he was and what
5 he was doing, things of that nature; Rene Gerard -- how he
6 took Rene Gerard out to the scene and showed her around --
7 showed her where he rode his bike that day. That's a
8 statement made by the defendant that was specified in the
9 reports, that were disclosed very early on in this case.

10 THE COURT: And are in constituent recordings
11 from jail conversations?

12 MR. BUTNER: The only ones that are really
13 specified in terms of being relevant and probative -- I think
14 that's what you are asking --

15 THE COURT: Uh-huh.

16 MR. BUTNER: -- and material, would be the
17 ones that were specified in Detective McDormett's report that
18 came out, basically, shortly after contemporaneously with the
19 January 29 disclosure, is my recollection.

20 THE COURT: And have --

21 MR. BUTNER: And we have done another one
22 since then? Okay. We have done another one since then.

23 THE COURT: And in general, what do they
24 purport to prove? They aren't admissions of having committed
25 the offense, I take it.

1 MR. BUTNER: No, they aren't that. But they
2 are basically various statements along the lines of he was
3 experiencing financial pressure or in one instance I think he
4 has made a statement as to riding his bike in the area. That
5 kind of thing.

6 THE COURT: And don't we get to the point of
7 cumulative on this stuff?

8 MR. BUTNER: It may well be that we would get
9 to the point of cumulative on that stuff. That is exactly
10 right, Your Honor.

11 THE COURT: Okay. Why, if you concede the
12 point, were some disclosures made after the cutoff date that
13 I imposed?

14 MR. BUTNER: Well, first of all, because we
15 didn't think that they were of any significance until they
16 were reviewed more carefully, and then it was determined that
17 they were relevant to certain issues in the case, and that
18 they have been requested. And so we complied with the
19 Court's order.

20 Now, bear in mind, Judge, we had been
21 disclosing the actual recordings all along.

22 THE COURT: That was part of my question that
23 I think you answered earlier.

24 MR. BUTNER: Okay.

25 THE COURT: Ms. Chapman.

1 MS. CHAPMAN: Your Honor, this arose
2 originally back in November or December, because we had
3 received over, I think, 2700 jail calls at that time. We
4 continued to receive them, and it is a very large quantity.
5 And that is why at the time Your Honor ordered the State to
6 identify by call time and number and recording number which
7 statements it was going to rely on, so that it could be
8 narrowed down. Because the State originally said "We're
9 going to rely on all 2700 of these calls." And apparently,
10 what I understand the State --

11 THE COURT: And are you saying that they
12 didn't do that at all?

13 MS. CHAPMAN: I'm saying they did that with
14 respect to a certain number of calls. They didn't identify
15 them in any way. They didn't say these are the statements we
16 intent to rely on, as Your Honor had ordered.

17 They provided them in a police report,
18 and they provided them in a thousand summaries and said you
19 should be able to figure out that this is what we meant.
20 Well, now we understand what they meant, but that is not what
21 happened. They didn't do it in compliance with Your Honor's
22 order.

23 They later have now disclosed additional
24 reports that they said they intend to rely on that are past
25 the deadline. So frankly, I don't know exactly what they

1 intend to rely on from these call summaries. And in addition
2 to that, this disclosure that just lists any and all
3 statements defendant made to 16 people doesn't comply with
4 that order either.

5 We need to know what statements the State
6 intends to use from what dates so that we are prepared and so
7 we can address whether they are cumulative or whether they
8 are relevant. That is what Your Honor's order contemplated.
9 That's what the rule contemplates. That's what will permit
10 us to be prepared to try this case in three weeks, and that's
11 not where we are, based on the State's disclosure.

12 My understanding of these supplemental
13 reports in March and April -- we continue to get recordings,
14 but these reports are apparently -- although they weren't
15 identified that way when they were disclosed, they've now
16 been identified as statements that the State intends to rely
17 on. They do have statements that were made in November of
18 2009 and January of 2010. They are being disclosed to us
19 now.

20 And again, Your Honor, all of these
21 summaries were withheld from us from late -- from January of
22 2010. We did have the 2700 recordings with no transcripts or
23 summaries that the State was receiving.

24 So we believe we should have been -- and
25 under your order and under the rule -- provided with notice

1 of the statements before today. We weren't provided with
2 that notice before today. We don't presently have the
3 notice. We don't think they've complied with the rule, and
4 we think what they've properly identified are the statements
5 that Mr. DeMocker made to law enforcement on July 2nd and 3rd
6 and October 23rd, and other than that, they haven't complied.

7 THE COURT: Well, I am going to wrap by the
8 order that I entered previously. And other than recordings
9 that may have taken place after the date -- and I didn't set
10 any time limits with regard to those made subsequent to that,
11 I was concerned about what had already taken place.

12 I think that the State has not complied
13 with Rule 15.1 in specifically identifying which statements
14 were to be made, and that is what the Court's order was
15 contemplating, so that there could be some true knowledge
16 about what the State regards as probative, relevant
17 statements from particular dates and time frames. To the
18 extent that they've provided summaries that identify by date
19 or a portion of the CD with some specificity, I am going to
20 let them use the statements potentially as far as exclusion
21 is concerned. I still see some other issues with regard to
22 relevance, cumulative, and those sorts of things.

23 So the recordings, in terms of failure to
24 comply with the Court's order, I am going to sanction as I
25 said I would sanction and preclude those from being used.

1 But in terms of the identification of phone calls, where the
2 phone calls were provided and some information was provided
3 before the Court's deadlines with regard to which statements
4 were made, I will let the State potentially use those as
5 against a sanction being imposed for that.

6 Mr. Butner, I am not clear, and I guess
7 even though they know the case much better than I do in terms
8 of the actual statements, it seems to me that the defense is
9 not clear about -- still -- about what statements on what
10 relevant points Mr. DeMocker may have made in jail, phone
11 calls, and the offer of proof isn't -- to the extent that you
12 discussed that as part of your response, isn't very
13 clarifying to me.

14 So, if there -- with regard to those
15 statements that you believe you timely disclosed, I think
16 there still needs to be an identification of the statement
17 made, of the timing of it, of what you are going to use in a
18 redacted form. You know, we are less than a month from trial
19 commencing. I recognize that we may not be a month from when
20 the stuff may be used. That may be further on down the road.
21 I think the defense needs that and needs that also by Tuesday
22 of next week. So ordered.

23 Miss Chapman.

24 MS. CHAPMAN: Your Honor, the only thing I
25 would add or ask is that with respect to this list of the

1 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

2 IN AND FOR THE COUNTY OF YAVAPAI

3 **FILED**
9 O'Clock A M

4 STATE OF ARIZONA,)

5 Plaintiff,)

6 vs.)

7 STEVEN CARROLL DEMOCKER,)

8 Defendant.)
9

JAN 28 2010 ✓

JEANNE HICKS, Clerk
BY MARY RYAN
Deputy

No. CR 2008-1339

10
11 BEFORE: THE HONORABLE THOMAS B. LINDBERG
12 JUDGE OF THE SUPERIOR COURT
13 DIVISION 6
YAVAPAI COUNTY, ARIZONA

14 PRESCOTT, ARIZONA
15 FRIDAY, JANUARY 15, 2010
16 9:47 A.M. SESSION

17 REPORTER'S TRANSCRIPT ON PROCEEDINGS

18
19 Hearing on Motions
20 Motion To Exclude Prior Act Evidence
21 Motion Re: Photos
22

23 LISA A. CHANEY, RPR, CSR, CR
24 Certified Reporter
Certificate No. 50801
25

ORIGINAL

LISA A. CHANEY, CR, RPR
CERTIFIED REPORTER

1 Book of Business was an issue in her mind. There is no
2 motion for relief filed by her or by anybody else or
3 Mr. Fruge. There's no communications that show up on her
4 computer from Mr. Fruge saying, you know, we got
5 hoodwinked about this Book of Business by Mr. DeMocker.

6 It was just a position taken in the divorce
7 case that was thoroughly argued and considered by both
8 sides and resolved, and it can't be any simpler than that.

9 And then to allow the State to continue this
10 unsupported, unwarranted attack on Mr. DeMocker for, you
11 know committing perjury, which is the most -- I think is
12 the most extreme position they took to these allegations
13 that he's committing fraud, that he's misleading the
14 Court, and that he's hiding something, is utterly
15 inappropriate under 404(B) and needs to be blocked right
16 now. So we would ask you to remember all of those things
17 in making a ruling on that. Thank you. I am done.

18 THE COURT: Generally under Rule 404(A), as
19 you know, evidence of a person's character or trait of
20 character is not admissible for purposes of proving action
21 and conformity. 404(B) provides that except as provided
22 in 404(C), which doesn't apply in this particular case,
23 evidence of other crimes or wrongs or acts is not
24 admissible to prove character of a person in order to show
25 action and conformity therewith.

1 It may, however, be admissible for other
2 purposes, such as, proof of motive, opportunities, and
3 preparation, plan, knowledge, identity or absence of
4 mistake or absence, that is not an exhaustive list of all
5 the purposes for which such evidence may be admitted.

6 And I readily acknowledge that the act itself
7 has to be proven by clear and convincing evidence for it
8 to be admissible, and then also there's a general
9 relevancy determination is this evidence itself relevant
10 and does it have reason being excluded for purposes of
11 prejudice confusion or waste of time.

12 So that is the analysis and I do have
13 testimony to rely on. I think that I need some review
14 personally of some the computer evidence to be absolutely
15 certain of my ruling in connection with that, but here's
16 my general ruling and observation.

17 Premeditation is a portion of what the State
18 must prove in connection with the computer searches that
19 bear on the topic of killing and, I guess, I do have a
20 comment about whether this implicates some kind of demand
21 or potential demand by the jurors for Mr. DeMocker to
22 testify or an undue pressure on him to testify.

23 I think there is plenty of evidence in the
24 record without Mr. DeMocker testifying that would allow
25 this defense to make an argument that this is something

1 that is researched for a book based on the files in which
2 the witnesses for the State would have to admit that
3 existed on the computer.

4 So I guess I disagree with the perception that
5 this would be some kind of undue pressure on the Defendant
6 to have to rebut but I don't disagree with the observation
7 about one of the retrieved items under a general search,
8 was even the smallest things can attack, and that that had
9 reference to a joke cite or that sort of thing.

10 So in terms of bringing that information
11 before a jury I don't find that the fifth amendment of
12 rights would be unnecessarily implicated. It's
13 acknowledged by I suspect by both sides that whoever
14 killed Carol Kennedy may have premeditated it to some
15 degree at least at the time of executing the blows and
16 observation about -- at least my recollection of the
17 facts, I find that the fact of the research existed and
18 existed on Mr. DeMocker's own computer and that there is
19 sufficient evidence with regard to identity of who is
20 doing the search.

21 I think the real argument becomes more for
22 what was being searched for and for what purpose and was
23 it to write a book and that sort of thing. The fact is
24 that the research took place and I find by clear and
25 convincing evidence that that research took place and that

1 Mr. DeMocker did it based on the evidence before me. I
2 think that more to the point -- and I do find that it fits
3 within the type of information for which it's admissible
4 under 404(B) for purposes of knowledge, motive, plan. And
5 the question I think comes down to relevancy and to the
6 degree of probative value being out weighed by the danger
7 of unfair prejudice, confusion, or misleading of the jury.

8 I think, therefore, based on my recollection
9 of the evidence that the evidence with regard to how to
10 kill and make it look like a suicide is admissible.

11 With regard to the specific research and the
12 evaluation or obtaining of employee identification number
13 as it relates to carbon monoxide when that's not connected
14 to the manner of killing in this case and it's not in my
15 recollection connected otherwise to the search, I think it
16 would put it outside the bounds of the evaluation of the
17 probative value versus prejudice resulting, and it carries
18 the additionally implication of an attack on the honest or
19 truthfulness of the Defendant in a fashion where it hasn't
20 been raised as a defense or an element of character.

21 So at least in the case in chief I think that
22 the obtaining of an employee -- employer identification
23 number or application for receipt of carbon monoxide
24 canisters and the research connected to carbon monoxide
25 with regard to that, I find at this time that for the

1 State's case in chief that evidence should be excluded by
2 the danger of unfair prejudice compared to the probative
3 value of that.

4 I think that the other evidence of research
5 is admissible and relevant and is free of the danger of
6 the exclusion of unfairly prejudicial evidence as is
7 discussed in Rule 403. I find that that issue does not
8 present itself. There's not a danger of unfair prejudice
9 as compared to the probative value. So that's Number 3.

10 I may want to revisit that after I examine
11 the transcript and my notes with regard to what was
12 testified to about the computer search. That would be my
13 ruling at this time.

14 With regard to the Book of Business and that
15 information which is in Number 4 and Number 5 according to
16 what the parties have asserted that's talking about the
17 fact of filing of financial documents. It is a fact.
18 It's a judicial noticeable fact because I've looked at the
19 domestic relations file. In looking at the domestic
20 relations file the characterization of those as false and
21 misleading is not something that I believe can be made.
22 I've already made findings of that in connection with my
23 findings on the Chronis hearing.

24 The statements in that sense are not hidden
25 from the parties or hidden in real terms from the Court.